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FORUM

RATEMAKING FOR OIL PIPELINES IN THE OUTER CONTINENTAL SHELF

William A. Mogel*

I. INTRODUCTION

*"Lay the proud usurpers low!
Tyrants Fall in every foe!
Liberty's in every blow!
Let us do or dee!"*

—14th Century Scottish song¹

Although the earliest offshore oil production occurred off the coast of California in 1896,² and onshore interstate oil pipelines generally have been subject to rate regulation since 1906³ there currently is no explicit federal statutory authority providing for the filing of tariffs and the regulation of rates charged by oil pipelines operating in the Outer Continental Shelf.⁴ This regulatory gap appears to be intentional but

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1. From the song *Scots Wha Hae Wi' Wallace Bled*, MD. B.J. 7 (Aug. 1981).

2. *Maryland v. Louisiana*, 101 S. Ct. 2114, 2119 n.1 (1981).

3. Interstate Commerce Act of 1887, Pub. L. No. 49-379, 24 Stat. 379 (codified as amended at 49 U.S.C. §§ 1-27 (1976)). The revised version of the Act was enacted into positive law Oct. 17, 1978, by Pub. L. No. 95-473, 92 Stat. 1337 (codified in scattered sections of 49 U.S.C.A. §§ 10101-11917 (West Supp. 1981)). For purposes of this Article, all citations to Title 49 of the United States Code, will be to the 1976 edition and not to the 1978 revised edition enacted after the various transfers of authority contained in Title 49, pursuant to the Department of Energy Organization Act of 1977, §§ 306, 402, 42 U.S.C. §§ 7155, 7172 (Supp. III 1979).

4. Generally, the Outer Continental Shelf is subject to the jurisdiction of the United States. In enacting the Outer Continental Shelf Lands Act of 1953, § 3, 43 U.S.C. § 1332(a) (1976), Congress declared it to be "the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and

unexplained. It is concluded here that any exercise of "ingenuity"⁵ by the Federal Energy Regulatory Commission (FERC)⁶ (which on October 1, 1977 succeeded to the Interstate Commerce Commission's jurisdiction over interstate oil pipelines)⁷ to subject offshore oil pipelines to federal rate regulation and tariff filing requirements would be unlawful.

Since oil pipelines operating in interstate commerce generally are subject to rate regulation under the Interstate Commerce Act,⁸ the absence since 1906 of clear statutory authority to regulate rates charged by oil pipelines operating in the Outer Continental Shelf must be assumed to be intentional. Arguably, however, there appear to be at least two sources of FERC ratemaking authority over Outer Continental

power of disposition as provided in this subchapter." *Id.* This provision was retained when Congress enacted the Outer Continental Shelf Lands Act Amendments of 1978, § 202, 43 U.S.C. § 1332(1) (Supp. III 1979); see also Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578 (entered into force June 10, 1964). Article 2 provides in part: "The coastal State [Nation] exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." *Id.* The 1953 Outer Continental Shelf Lands Act has been interpreted as establishing the sovereign rights of the United States with respect to the exploration for and exploitation of natural resources in the Outer Continental Shelf. *United States v. Maine*, 420 U.S. 515, 526 (1975).

5. *Cf. Missouri Edison Co. v. FPC*, 479 F.2d 1185, 1189 (D.C. Cir. 1973). In this case, the court criticized FPC's failure to utilize "ingenuity": "It is a sad commentary on our regulatory agencies that not only a business but an entire community could . . . be destroyed for lack of agency ingenuity." *Id.*

6. FERC, a five-member independent regulatory agency within the Department of Energy, succeeded to the functions of the Federal Power Commission and the Interstate Commerce Commission's jurisdiction over oil pipelines. See Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352 (Supp. III 1978); Exec. Order. No. 12009, 42 Fed. Reg. 46267 (1978). See generally Moody, *The FERC Inheritance—Unresolved Problems in Producer Regulation*, TWENTY-NINTH INST. ON OIL & GAS L. & TAX'N 417 (1978); Williams, *Natural Gas and the Federal Energy Regulatory Commission*, 13 TULSA L.J. 761 (1978).

7. Department of Energy Organization Act of 1977, 42 U.S.C. §§ 7155, 7172 (Supp. III 1979). Although this Act transferred jurisdiction over interstate oil pipelines, "no substantive changes in the existing method of regulation under the Interstate Commerce Act" were proposed. S. REP. NO. 164, 95th Cong., 1st Sess., reprinted in 1977 U.S. CODE CONG. & AD. NEWS 854, 889.

8. Presently pending before the Congress is legislation removing FERC jurisdiction over all oil pipeline rates. According to *Bills to Lift FERC Regulation of Oil Pipeline Rates Due in Congress*, INSIDE F.E.R.C., Sept. 14, 1981 at 1:

Legislation removing Ferc jurisdiction over oil-pipeline rates is scheduled to be introduced today (Sept. 14) in both the House and Senate, congressional sources said late last week. The proposals, by Rep. Michael Synar, D-Okla., and Sen. Donald Nickles, R-Okla., would retain Ferc authority to grant relief to shippers discriminated against by oil pipelines. In at least the House version, the Trans Alaskan Pipeline System will specifically be excluded from deregulation, a House staffer said.

The House proposal also states that any antitrust laws still will apply to pipelines. According to aides, the House version would keep the House Energy and Commerce Committee's jurisdiction over the legislation by amending the 1977 DOE Organization

Shelf pipelines; the Outer Continental Shelf Lands Act, as amended,⁹ and the logic of filling a regulatory gap. Whether tariff filing requirements can be imposed on oil pipelines operating in the Outer Continental Shelf has never been tested before the courts, the FERC, or the Interstate Commerce Commission (ICC). At issue, *inter alia*, is the meaning of "interstate" as used by the Interstate Commerce Act. If oil pipelines in the Outer Continental Shelf are not operating in interstate commerce, as defined by the Interstate Commerce Act,¹⁰ then FERC would lack rate jurisdiction and the authority to require the filing of tariffs by such pipelines.

With regard to the Outer Continental Shelf Lands Act, the statute provides prorationing authority over oil pipelines operating in the Outer Continental Shelf, but any ratemaking authority conferred upon FERC must depend on an overreaching construction of the statute's anti-discrimination provisions. In addition, the legislative history of recent amendments to the Outer Continental Shelf Lands Act is a further indication of congressional intent to regulate oil pipelines in the Outer Continental Shelf differently from onshore interstate oil pipelines.

This Article examines the nature of the oil pipeline industry, the history of rate regulation of onshore oil pipelines by the ICC and FERC, as well as the scope of the Outer Continental Shelf Lands Act, as amended. Notwithstanding a judicial tendency to sanction the filling of a regulatory gap with a finding of federal jurisdiction,¹¹ it is this author's conclusion that absent specific statutory authority, no rate regulation of oil pipelines in the Outer Continental Shelf can or should be inferred.

Act. Other approaches—such as amending the Interstate Commerce Act—could send any bill to other committees.

More specifically, the House bill would:

—Repeal section 306 of the DOE act, which transfers the Interstate Commerce Commission's jurisdiction over oil pipelines to DOE.

—Repeal a subsection of section 402 of the DOE act, which delegates authority over oil pipelines to Ferc.

—Rewrite that subsection to redelegate authority over oil pipelines to Ferc as currently exists, except for commission authority to prescribe rates and charges.

—Repeal ICC authority under the Interstate Commerce Act to regulate oil pipeline rates and charges.

Id.

9. 43 U.S.C. § 1332(1) (Supp. III 1979).

10. Although the Act does not define interstate commerce, the Act's definition of "transportation" excludes the Outer Continental Shelf from its scope. See *infra* text accompanying notes 18-20.

11. See, e.g., *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 635 (1972).

II. REGULATION OF OIL PIPELINES UNDER THE INTERSTATE COMMERCE ACT

*"[T]he [ICC] did not pursue an aggressive policy of regulation"*¹²

Approximately seven years after the first oil well was discovered near Titusville, Pennsylvania, the first commercially successful oil pipeline was completed in Pennsylvania on October 7, 1865. It was 32,000 feet long and transported 81 barrels an hour at a cost of one dollar per barrel.¹³ For approximately the next fifty years the construction and operation of oil pipelines was active and followed the various discoveries of oil throughout the nation. By 1919, total oil pipeline mileage was approximately 40,000 miles.¹⁴

Early in the twentieth century, however, several legal events significantly affected the oil pipeline industry. The first was the passage of the Hepburn Act of 1906 as an amendment to the Interstate Commerce Act.¹⁵ Although the Hepburn Act was intended primarily to regulate the rates and practices of railroads, a provision sponsored by Senator Lodge made oil pipelines common carriers subject to regulation by the Interstate Commerce Commission.¹⁶ The jurisdictional language of the Hepburn Act was found in section 1 of the Interstate Commerce Act, which provided: "The provisions of this chapter shall apply to common carriers engaged in—. . . (b) the transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water."¹⁷ The Act defined "common carrier" as including "all pipeline companies."¹⁸ Such a definition seemingly would have included offshore oil pipelines, except for the qualification that the provisions applied only to transportation:

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place

12. Prewitt, *The Operation and Regulation of Crude Oil and Gasoline Pipe Lines*, Q.J. OF ECONOMICS, Feb. 1942, at 203.

13. G. WOLBERT, JR., U.S. OIL PIPE LINES 1-2 (1979) [hereinafter cited as WOLBERT].

14. *Id.* at 3-15.

15. Act of June 29, 1906, Pub. L. No. 337, ch. 3591, 34 Stat. 584 (codified as amended at 49 U.S.C. § 1 (1976)).

16. 40 CONG. REC. 6360-73 (1906).

17. 49 U.S.C. § 1(1) (1976). The revised Interstate Commerce Act does not contain this language due to the transfer of authority for oil pipelines to DOE. *See supra* text accompanying notes 6-7.

18. 49 U.S.C. § 1(3)(a).

in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the United States.¹⁹

This definition excluded transportation by oil pipelines from the Outer Continental Shelf to a state because the Outer Continental Shelf is neither a state nor a territory as those terms are used in the Act.²⁰

The plain meaning of the Interstate Commerce Act is consistent with its legislative history.²¹ During consideration of the Hepburn Bill,²² the only discussion of the Act's geographic reach centered on an amendment offered by Senator Morgan that would have imposed common carrier obligations on:

Any corporation or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artificial gas by means of pipelines or partly by pipelines and partly by railroad or partly by pipe lines and partly by water *at any place within the jurisdiction or within the governmental authority of the United States*. . . .²³

This amendment was adopted by the Senate²⁴ during initial floor debate on the bill, thus "[making] a common carrier of the pipeline that the Administration has permitted the Union Oil Company, of California, to construct across the Isthmus" of Panama.²⁵ Arguably, the broad language of Senator Morgan's amendment would have made Outer Continental Shelf pipelines subject to the full jurisdiction of the Interstate Commerce Act. However, the amendment was stricken because the Hepburn Act contained a "commodities clause" that barred a common carrier from transporting its own commodities.²⁶ Union Oil, which had expended nearly three million dollars on tank vessels and pipeline construction across the Panama Isthmus, would have been prohibited from transporting its oil through its pipeline. Despite alle-

19. *Id.* § 1(b).

20. *See infra* note 82.

21. *See generally* 40 CONG. REC. 1520-9807 (1906). It is arguable, however, whether in 1906 Congress fully contemplated the existence of offshore oil pipelines.

22. H.R. 12987, 59th Cong., 1st Sess., 40 CONG. REC. 1520 (1906).

23. 40 CONG. REC. 6366, 6953 (1906) (emphasis added).

24. *Id.* at 6367.

25. *Id.* at 6953.

26. 40 CONG. REC. 6953-56.

gations of favoritism,²⁷ Congress deleted the language that would have subjected Union Oil's pipeline to full common carrier obligations.²⁸

The next significant legal event occurred in 1911 when the Supreme Court, in *Standard Oil Co. v. United States*²⁹ ordered the dissolution of the Standard Oil Company of New Jersey for violating the Sherman Act.³⁰ The dissolution decree ordered that each shareholder receive a proportionate share of the thirty-three successor companies, including ten common carrier pipeline companies.³¹ After dissolution, resulting "managerial independence and changing conditions . . . gradually caused [these ten companies] . . . to compete vigorously against their former affiliates."³²

The third legal event that affected the oil pipeline industry was the passage of the Valuation Act of 1913.³³ This Act facilitated the calculation of oil pipeline rates by providing a method for arriving at the pipeline's rate base. Specifically, the Act required the Interstate Commerce Commission to:

(1) [U]tilize valuation exclusively as the rate base for pipelines, and (2) "to ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reasons for their differences, if any." The Valuation Act further provides that the final valuation so determined by the Commission shall be *prima facie* evidence of the value of the property in all [ICC] proceedings. . . .³⁴

This "ICC valuation" methodology was based on the concept of "fair value"³⁵ as articulated in *Smyth v. Ames*.³⁶ However, notwithstanding the Valuation Act's requirement that the Interstate Commerce Com-

27. *Id.* at 6953-55 (remarks of Sen. Morgan).

28. The language stricken was "at any place within the jurisdiction or within the governmental authority of the United States." *Id.* at 6956.

29. 221 U.S. 1 (1911).

30. 15 U.S.C. §§ 1-7 (1976).

31. WOLBERT, *supra* note 13, at 13.

32. *Id.* at 14-15 (footnote omitted).

33. 49 U.S.C. § 19a(a) (1976).

34. WOLBERT *supra* note 13, at 278 (quoting 49 U.S.C. § 19a(b) (1976)).

35. Navarro and Stauffer, *The Legal History and Economic Implications of Oil Pipeline Regulation*, 2 ENERGY L.J. 291, 302 (1981) [hereinafter cited as Navarro and Stauffer].

36. 169 U.S. 466 (1898). *Cf.* *St. Louis & O'Fallon Ry. v. United States*, 279 U.S. 461, 486-87 (1929). The Court rejected the Interstate Commerce Commission's attempt to use only original cost in estimating the value of the carrier's property.

mission establish a valuation for every oil pipeline, only two rate cases came before the Commission between 1914 and 1934.³⁷

The 1914 Supreme Court decision in *The Pipe Line Cases*³⁸ was the fourth legal factor influencing the development of oil pipelines. Justice Holmes, writing for the Court, held that the Uncle Sam Oil Company, which had a Kansas refinery connected to Oklahoma oil wells by a company-owned pipeline, was not subject to the Interstate Commerce Commission's jurisdiction under the Hepburn Act.³⁹ The Supreme Court concluded:

It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When . . . a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end.⁴⁰

The "practical thrust" of *The Pipe Line Cases* was to make all large interstate crude oil and petroleum products pipelines subject to federal regulation under the Interstate Commerce Act.⁴¹ These oil pipelines were required "to conduct their operations, make their services available to, and deal with, all shippers on a completely nondiscriminatory basis and to file just and reasonable tariff rates."⁴²

The fifth significant regulatory action occurred in 1940 when the ICC initiated the *Reduced Pipeline Rates and Gathering Charges* proceeding.⁴³ As a result of the proceeding, it was determined that an eight percent return on valuation for the transportation of crude oil was appropriate.⁴⁴ However, in 1941, in *Petroleum Rail Shippers' Association v. Alton & Southern Railroad*,⁴⁵ the ICC concluded that a ten percent return on valuation was appropriate for the transportation of

37. See Navarro and Stauffer, *supra* note 35, at 301. The ICC's valuation methodology was crystallized into the "Oak formula" which, although characterized as "bizarre," was said to have "actually worked." *Id.* at 296.

38. 234 U.S. 548 (1914).

39. *Id.* at 562.

40. *Id.*

41. WOLBERT, *supra* note 13, at 13.

42. *Id.* (footnote omitted); 49 U.S.C. §§ 1(4), 3(1), 1(5) (1976).

43. 243 I.C.C. 115 (1940).

44. See *id.* at 143-44. The ICC's adoption of an 8% return for crude oil pipelines was restated in *Minnelusa Oil Corp. v. Continental Pipe Line Co.*, 258 I.C.C. 41, 53 (1944).

45. 243 I.C.C. 589 (1941).

refined products by a pipeline.⁴⁶

Two further legal landmarks for the oil pipeline industry occurred in 1941. The first of these was the passage of the Cole Act⁴⁷ in July, 1941. This legislation "enabled interstate pipelines to exercise the right of eminent domain when the President determined that such action was in the interest of the national defense."⁴⁸ The Cole Act was passed in response to inhibitory action by railroads fighting to preserve their petroleum traffic from interstate oil pipelines.⁴⁹

The second and more significant legal event of 1941 was the Consent Decree,⁵⁰ "entered in settlement of a civil complaint . . . alleging that payments of dividends by common carrier oil pipelines to their old oil company parents constituted unlawful rebates."⁵¹ According to one source, the Decree "represented another effort by the government to restrain the alleged monopoly power of oil pipelines."⁵² The 1941 Consent Decree prohibited oil pipelines accepting the Decree "from paying out dividends in excess of 7% on the ICC valuation rate base."⁵³ Earnings in excess of 7% were to be "placed in a special account and restricted . . . to the retirement of [the pipeline's] debt or new construction which . . . could not be added to the valuation base."⁵⁴

46. *Id.* at 663. "[T]he 2% differential over the crude oil rate reflected an additional 'risk premium' . . . [since] at that time, shipping refined products was an infant industry subject to greater risks than the more established crude oil system." Navarro and Stauffer, *supra* note 35, at 302 (footnote omitted).

47. Act of July 30, 1941, ch. 333, 55 Stat. 610 (enacted as part of the emergency and war powers). Most of this Act terminated according to its own terms as set out in § 9 of the Act. What remains of the Act is codified in 15 U.S.C. § 715 (1976).

48. WOLBERT, *supra* note 13, at 20.

49. *Id.*

50. *United States v. Atlantic Refining Co.*, No. 14060 (D.D.C. Dec. 23, 1941). The Department of Justice recently moved to vacate the Consent Decree, arguing that it "is no longer in the public interest because it is not necessary to achieve the . . . objective of preventing rebates, because it rests on a methodology which is seriously flawed and out of date, and because it interferes with the FERC's responsibility to regulate oil pipelines." 47 FOSTER OIL PIPELINE REP. 1 (Nov. 1981).

51. 47 FOSTER OIL PIPELINE REP., *supra* note 50, at 1.

52. See Navarro and Stauffer, *supra* note 35, at 303. The authors observed that another factor leading to the Consent Decree was:

The pipelines, however, soon found a way to circumvent the intent of the *Hepburn Act* by levying high tariffs for use of the pipeline and then rebating the resultant large profits back to the parent oil producers in the form of dividends. The effects of this rebate scheme were to: 1) depress the price of oil at the wellhead; 2) exclude independent producers and refiners from the market because they found the rates and/or the capital costs of vertically integrating themselves prohibitively high; and thereby, 3) slow the rate of exploration and development of oil reserves. . . .

Id.

53. *Id.* at 304.

54. *Id.* (footnote omitted).

This restriction "acted as a compelling disincentive to exceed the 7% ceiling, since any such proceeds were financially sterilized."⁵⁵ The regulatory impact of the Consent Decree was that it gave "birth to a double standard for oil pipeline regulation: one set by the ICC and one set by the DOJ [Department of Justice]."⁵⁶ This was because the Consent Decree allowed a 7% rate of return, while the ICC methodology adopted one year earlier in its *Reduced Pipeline Rates and Gathering Charges* proceeding, permitted an 8% or 10% return on the transportation of crude oil or refined products.⁵⁷ This dual standard existed for approximately thirty-five years.⁵⁸

The last significant legal event was "the first federal judicial foray into the area of oil pipeline ratemaking" in *Farmers Union Central Exchange v. FERC*.⁵⁹ At issue in *Farmers Union* was the appropriate rate methodology to be applied by FERC to oil pipelines.⁶⁰ In ordering a

55. *Id.*

56. *Id.*

57. *Id.* at 302-04.

58. *Id.* at 304.

59. 584 F.2d 408, 417 (D.C. Cir.) (footnote omitted), *cert. denied sub nom. Williams Pipe Line Co. v. FERC*, 439 U.S. 995 (1978). A contemporary proceeding with *Farmers Union* is the FERC proceeding presently pending in *Trans-Alaska Pipeline System*, No. OR78-1 (FERC, June 28, 1977). One source, recognizing the importance of these two cases, has observed, "At this time, there are over 80 other cases awaiting the resolution of those two cases, as FERC has suggested that it may rely on the TAPS and Williams Brothers decisions to develop a generic methodology for oil pipeline ratemaking." Navarro and Stauffer, *supra* note 35, at 294-95.

60. 584 F.2d at 416; *see supra* note 6. The ICC oil pipeline functions that were transferred to FERC include, *inter alia*, ICC's authority to enforce:

(1) The pipelines' duty ". . . to provide and furnish transportation upon reasonable request therefor . . ." [Section 1(4)] and ". . . to establish reasonable through routes with other such carriers . . ." [Sections 1(4) and 15(3)] and establish ". . . just and reasonable rates, fares, charges and classifications . . ." [Sections 1(4), (5) and (6)]

(2) The prohibition against subjecting any shipper, locality or territory . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . ." [Section (3)]

(3) The prohibition against charging or receiving "any greater compensation in the aggregate for the transportation . . . of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates . . ." [Section 4]

(4) The requirement that every pipeline file with the Commission all rates, charges, classifications, regulations and practices for transportation between all points on its system [Section 6] and not demand or collect any different compensation for transportation than specified in its filed tariff [Sections 2 and 6(7)]

(5) The authority of the Interstate Commerce Commission to review all pipeline rates and, if it determines that a rate is unjust or unreasonable, or unjustly discriminatory or unduly preferential, to suspend such rate and determine the just and reasonable rate [Sections 15(1) and (7)]

(6) The prohibition against a pipeline's entering into any agreement with any other pipeline for the pooling or division of traffic service, or gross or net earnings, ex-

remand to FERC,⁶¹ "to avail ourselves of some additional expertise . . . into this new and difficult area",⁶² the court of appeals critically examined the "fair value" ratemaking methodology utilized by the ICC in regulating oil pipelines.⁶³ Although it did not direct FERC to adopt the original cost methodology it uses in regulating interstate natural gas pipelines,⁶⁴ the court did state that the "three indicia of a tradition of fair value ratemaking are weak and outmoded."⁶⁵

This survey of the significant legal events affecting oil pipelines from 1906 to 1981 reveals that regulation of oil pipelines operating in the Outer Continental Shelf was not a matter of specific consideration. Other than the amendment proposed by Senator Morgan in 1906,⁶⁶ it appears that if federal rate regulation of oil pipelines operating offshore were contemplated, it was not acted upon.

cept upon the specific approval by order of the Interstate Commerce Commission [Section 5(1)]

(7) The duty of every pipeline to file annual, periodical, and special reports as the Interstate Commerce Commission may require and in the form so required [Section 20(1)]

(8) The authority of the Interstate Commerce Commission to prescribe a Uniform System of Accounts for pipelines which shall be used by all pipelines [Section 20(3)] and to prescribe rates of depreciation for pipeline property which must be used by all pipelines [Section 20(4)]

(9) The authority of the Interstate Commerce Commission or any duly authorized special agent, accountant or examiner at all times to inspect all accounts, books, records, correspondence or other documents of every pipeline [Section 20(5)]

(10) The authority to provide a basic and annual valuation of each pipeline's property [Section 19a]

H.R. REP. NO. 539, 95th Cong., 1st Sess. 68-70, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 925, 939-41 (sections referred to in quote are sections in chapter 1 of Title 49 prior to amendment).

Section 705(a) of the DOE Organization Act provides that rules and regulations relating to functions transferred from ICC to FERC shall continue in effect until modified by FERC. 42 U.S.C. § 7295(a) (Supp. III 1979); *see also* Order Providing for Continuation of Functions Vested in, or Delegated to, the Federal Energy Regulatory Commission, 42 Fed. Reg. 55,450 (1977). Those regulations in 49 C.F.R. §§ 1200-1299 (1980) applicable to FERC's oil pipeline jurisdiction have been transferred to Title 18 of the Code of Federal Regulations and duplicated to contain the language that generally existed at the time the DOE Act took effect. 46 Fed. Reg. 9,043 (1981). FERC will eventually transfer to Title 18 those regulations applicable to oil pipeline jurisdiction which are contained in 49 C.F.R. §§ 1000-1199 (1980) & §§ 1300-1332 (1981). *Id.* at n.3.

61. 584 F.2d at 421.

62. *Id.*

63. *See id.* at 412-21.

64. *See* 15 U.S.C. § 3341 (Supp. III 1979). For a critical analysis of FERC's ratemaking methodology for interstate gas pipelines, *see* Mogel & Mapes, *Assessment of Incremental Pricing Under the Natural Gas Policy Act*, 29 CATH. U.L. REV. 763 (1980).

65. 584 F.2d at 418. FERC exercises its regulatory jurisdiction over common carrier oil pipelines operating onshore by requiring that such pipelines file tariffs with FERC (49 C.F.R. §§ 1300-.200 (1980)), comply with uniform accounting and record-keeping procedures (18 C.F.R. §§ 352, 362 (1981)), and submit certain reports and data in order to receive FERC-established valuations (46 Fed. Reg. 9,043 (1981) (to be codified at 18 C.F.R. §§ 357.2, 360.1-.12, 361.1-.103)).

66. *See supra* text accompanying note 23.

III. REGULATION OF OIL PIPELINES UNDER THE OUTER CONTINENTAL SHELF LANDS ACT

"[M]any shall run to and fro, and knowledge shall be increased."⁶⁷

Against this background of regulation of oil pipelines by the ICC and the Department of Justice, as a result of the 1941 Consent Decree, Congress in 1953 enacted the Outer Continental Shelf Lands Act (OCS Lands Act),⁶⁸ which dealt directly with the granting of rights-of-way to oil pipelines operating on the Outer Continental Shelf. The OCS Lands Act did not expressly require OCS pipelines to be operated as common carriers; rather, section 5 of the OCS Lands Act required only that OCS oil and gas pipelines:

[T]ransport or purchase without discrimination, oil or natural gas produced from said submerged lands in the vicinity of the pipeline in such proportionate amounts as the Federal Power Commission, in the case of gas, and the Interstate Commerce Commission, in the case of oil, may . . . determine to be reasonable⁶⁹

Based on the language of section 5, Congress appears to have provided ICC with only prorationing authority and not with jurisdiction to regulate rates charged by Outer Continental Shelf oil pipelines.⁷⁰ In

67. *Daniel* 12:4.

68. 43 U.S.C. §§ 1331-1343 (1976); see also Mineral Lands Leasing Act of 1920, 30 U.S.C. § 185 (1976), wherein Congress provided: "Rights-of-way through the public lands . . . may be granted by the Secretary of the Interior for pipeline purposes for the transportation of oil or natural gas . . . upon the express condition that such pipelines shall be constructed, operated, and maintained as common carriers." The Mineral Lands Leasing Act, however, did not deal specifically with rights-of-way across OCS lands. Moreover, the applicability of § 185 to the OCS was never determined by the courts; cf. *Justheim v. McKay*, 229 F.2d 29 (D.C. Cir.) cert. denied, 351 U.S. 933 (1956), where the court of appeals affirmed the district court's holding that the Mineral Lands Leasing Act does not apply to the marginal sea lands, i.e., those lands extending seaward for three miles from the mean low tide mark. 229 F.2d at 30, *aff'd* 123 F. Supp. 560, 568 (1954). The district court found that Congress intended the Mineral Lands Leasing Act to apply only to "public lands"—generally defined as those lands of the United States that are subject to sale or other disposal under general laws, and although the United States might have certain rights in the marginal sea lands, they could not be regarded as public lands because they "have never been held open for sale or public disposal." 123 F. Supp. at 565.

69. Outer Continental Shelf Lands Act, § 5(c) 43 U.S.C. § 1334(c) (1976).

70. The legislative history of the OCS Lands Act reveals little of the intent of Congress with respect to the nature of the authority granted to the ICC over OCS oil pipelines. The Statement of the Managers on the Part of the House accompanying the Conference Report contains only the following statement regarding the granting of rights-of-way to oil pipelines: "The Secretary [of the Interior] is authorized to grant rights-of-way for pipelines and the Federal Power Commission in the case of gas and the Interstate Commerce Commission in the case of oil and authorized to determine the conditions of such transportation." H.R. CONF. REP. No. 1031, 83d Cong., 1st Sess. —, reprinted in 1953 U.S. CODE CONG. & AD. NEWS 2177, 2184. Debate over the proposed OCS Lands Act focused on the controversial "oil-for-education" amendments, which would have chan-

section 5, Congress was drawing a distinction between the general obligations of common carriers and the more specific duty to transport or purchase oil without discrimination.⁷¹

Despite the absence of complaints under section 5,⁷² Congress, by the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA)⁷³ amended the OCS Lands Act as follows:

Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this subchapter, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary . . . and upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or Outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice

neled rentals and royalties received under the Act directly into educational purposes. *See* 99 CONG. REC. 10,471-76 (1953).

Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. No. 93-153, 87 Stat. 576 (1973) supports the view that Outer Continental Shelf oil pipelines are not subject to the broad common carrier regulations applicable to on-shore oil pipelines. The TAPS Act excludes lands on the Outer Continental Shelf from the definition of "public lands" as that term is used in section 28 of the Mineral Lands Leasing Act. Specifically, section 101 of the TAPS Act, codified at 30 U.S.C. § 185(b)(1) (1976), provides in pertinent part: "For the purposes of this section 'Federal Lands' means all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf."

This exclusion makes clear that the OCS Lands Act provisions are controlling with respect to regulating the practices of oil pipelines on the Outer Continental Shelf. According to the conference report accompanying the TAPS Act:

These [OCS] lands have always been treated separately from other Federally-owned lands because of their peculiar physical characteristics and because they are not owned by the United States in its proprietary capacity. There is a statute now in existence authorizing oil and gas pipelines on such lands, and this bill leaves it unaffected (43 U.S.C. § 1334(c)).

S. Rep. No. 207, 93d Cong., 1st Sess. —, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2417, 2435-36.

71. A similar distinction was recognized in *Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289, 302 (D. Colo. 1969) in which the court found liability under the common carrier provision of the Mineral Lands Leasing Act but no violation of the separate duty found in the same section of that Act "to transport or purchase oil produced from Government lands." *Id.*

72. "This Commission [the ICC] has held no hearings under the Outer Continental Shelf Lands Act, since there has been no complaint or information of any kind that any pipeline on a right-of-way granted under that Act has been guilty of discrimination in its operations." Letter from then ICC Chairman George M. Stafford to Senator Henry M. Jackson Apr. 9, 1973, *reprinted in* 1973 U.S. CODE & CONG. AD. NEWS 2495, 2497 (citation omitted).

73. Pub. L. No. 95-372, 92 Stat. 629 (codified as amended in scattered sections of 43 U.S.C.).

thereof to the interested parties, determine to be reasonable⁷⁴

The OCS Lands Act also was amended specifically to require that oil pipelines granted rights-of-way on or across the Outer Continental Shelf "provide open and nondiscriminatory access to both owner and nonowner shippers."⁷⁵ Although by this amendment, Congress preserved FERC's prorationing authority, it granted no authority to FERC to regulate the rates of offshore oil pipelines.⁷⁶ During consideration of the OCSLAA, Congress rejected a significant opportunity to make offshore oil pipelines subject to rate jurisdiction and the other requirements set forth in the Interstate Commerce Act for onshore common carrier oil pipelines. During floor debate on the proposed OCS amendments, Representative John Seiberling introduced an amendment that would have extended FERC's rate and valuation authority over oil pipelines to offshore oil pipelines.⁷⁷ In support of this

74. 43 U.S.C. § 1334(e) (Supp. III 1979).

75. *Id.* § 1334(f)(1)(A).

76. *See id.* §§ 1301-1366; *cf.* Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524 (1976), which provides in pertinent part that licensees under the Deepwater Port Act "shall accept, transport, or convey without discrimination all oil delivered to the deepwater port." *Id.* § 1507(b). In addition to this anti-discrimination provision, Congress also provided that all deepwater ports and associated storage facilities are subject to regulation as common carriers under the Interstate Commerce Act. *Id.* § 1507(a). Section 1507(b) also authorizes investigations under section 13 of the Interstate Commerce Act to determine whether deepwater ports and their associated facilities are complying with their obligations under sections 1 and 6 of the Interstate Commerce Act, 49 U.S.C. §§ 1, 6, 13 (1976). FERC recently exercised this authority and issued two orders initiating investigations under § 13 to determine (1) whether LOOP, Inc., the country's first deepwater port, and LOCAP, Inc., a pipeline and storage facility associated with LOOP, engaged in transportation of oil as common carriers subject to regulation under the Interstate Commerce Act and (2) whether LOOP and LOCAP should have tariffs on file with FERC in accordance with section 6 of the Interstate Commerce Act. [July-Sept. 1981 Transfer Binder] FED. ENERGY REG. COMM. (CCH) ¶¶ 61,131, 61,133. Neither LOOP nor LOCAP has filed a tariff with FERC setting forth the rates and charges for transportation of oil through the deepwater port facility. LOOP and LOCAP, which began on or about May 5, 1981, to receive and transport oil from the port through 47 miles of offshore and onshore pipelines, characterize their activities as taking place during a "preoperating test period," not yet subject to FERC's Interstate Commerce Act and Deepwater Port Act jurisdiction. *Id.*

77. The Seiberling proposal would have amended section 5(e) of the OCS Lands Act, 43 U.S.C. § 1334, to read as follows:

(e) Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this Act, may be granted by the Secretary for pipeline purposes for the transportation of minerals under such regulations and upon such conditions as may be prescribed by the Secretary All pipelines constructed on rights-of-way or constructed pursuant to easements granted under this Act, except pipelines operated entirely within a single lease, shall (1) be subject to regulation under the Natural Gas Act, as amended, in the case of other pipelines, and shall (2) accept, convey, transport or purchase, without discrimination and at reasonable rates, minerals produced from submerged lands in the vicinity of the pipeline in such proportionate amounts as the Secretary of Energy in the

amendment, Representative Seiberling argued that:

Right now, the Department of Energy and the Federal Regulatory Commission [sic]—which is the successor agency to the Interstate Commerce Commission with respect to oil pipelines—may regulate interstate oil pipelines. However, the Interstate Commerce Act's definition of "interstate" does not cover a pipeline from the OCS to a point onshore unless that pipeline is an integral part of an interstate system beginning at that point onshore. The result is that the ICC never had regulatory authority over OCS oil pipelines, except that granted in section 5(c) of the existing OCS Act, which gives the ICC authority to proration oil in OCS pipelines.⁷⁸

Representative Seiberling's proposed amendment was not enacted.⁷⁹ Thus, it must be concluded that the OCS Lands Act, as recently amended by the OSCLAA, conferred no rate jurisdiction on FERC or any other federal agency over oil pipelines operating in the Outer Continental Shelf.

IV. THE SCOPE OF FEDERAL REGULATION

*[A] woman complained that her husband had deliberately taken a job with the city as a garbageman in order to reduce his pay and his alimony payments. She belabored this point until Judge Soper could stand no more. "Madam," he interrupted, "I do not think you make sufficient allowance for the glamour of public office."*⁸⁰

Although some offshore oil pipelines have filed with FERC various records and tariffs required to be filed by onshore, interstate common carrier pipelines,⁸¹ there is a persuasive argument for concluding that Outer Continental Shelf oil pipelines are not subject to the tariff provisions of the Hepburn Act. Based upon the plain meaning of

case of energy minerals, and the Interstate Commerce Commission in the case of other minerals, may determine to be reasonable . . .

124 CONG. REC. 1626 (1978).

78. *Id.*

79. See *id.* at 2093, 2097. Floor debate on Rep. Seiberling's proposed amendment does not show that, in rejecting the amendment, Congress was specifically rejecting the extension of FERC's oil pipeline rate jurisdiction over Outer Continental Shelf oil pipelines. Rather, the debate on the House floor focused on what some members perceived to be the overly-broad grant of authority to the Secretary to grant rights-of-way subject to "such regulations and upon such conditions as may be prescribed by the Secretary." *Id.* at 1628 (1978).

80. McC. Mathias, Jr., Book Review, 37 MD. L. REV. 676, 677 (1978) (discussing an anecdote in H.W. LEWIS, THE UNITED STATES DISTRICT COURT OF MARYLAND (1977)).

81. 124 CONG. REC. 1626 (1978).

"transportation" as used in section 7(c) of the Interstate Commerce Act, it is clear that although statutory language grants tariff jurisdiction over oil pipelines in several specific instances, none of these covers oil pipeline transportation from the Outer Continental Shelf to a state.⁸² This plain reading of section 7(c) is supported by the congressional rejection of the Morgan Amendment⁸³ which arguably would have made common carrier oil pipelines subject to the full jurisdiction of the ICC and its successor, FERC. Further support for this curtailment is found in the defeat of the Seiberling amendment to the OCSLAA.⁸⁴

A second reason to support the conclusion that Outer Continental Shelf oil pipelines are not required to file rate tariffs is found in the OCSLAA, which grants FERC authority to exempt "gathering lines" from the nondiscriminatory access requirements and capacity expansion authority provisions of that Act.⁸⁵ Under authority granted by the OCS Land Act,⁸⁶ the Secretary of the Interior distinguished transportation lines from gathering lines. Pursuant to this authority, the Secre-

82. Section 7(c) cannot be construed as applying to offshore oil pipelines because it cannot be argued that the Outer Continental Shelf is a territory of the United States. It is generally recognized that the word "territory" has two distinct meanings. "Territory" or "territories of the United States" is sometimes used in a jurisdictional sense to describe all the territorial possessions of the United States or the entire domain "over which the United States . . . exercises dominion and control as a sovereign power." *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923). In *Cunard*, the Supreme Court held that the word "territory" in the eighteenth amendment "means the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power." *Id.* In contrast, "territory" also is sometimes used to designate a political subdivision of the United States not included within the boundaries of any of the states. For example, in *In Re Lane*, 135 U.S. 443 (1890), the Supreme Court stated that territories refer "exclusively to that system of organized government long existing within the United States, by which certain regions of the country have been erected into civil governments," including an executive, a legislative, and a judicial system, and these governments have certain powers conferred upon them by acts of Congress. *Id.* at 447.

Dispositive on this issue, however, is the Supreme Court's interpretation of "territory" in *ICC v. Humboldt Steamship Co.*, 224 U.S. 474 (1912), which virtually rules out the possibility that the Outer Continental Shelf can be classified as a territory within the meaning of the Interstate Commerce Act. The question presented to the Court in *Humboldt* was whether Alaska, which had not yet been admitted to statehood, could be considered a territory within the meaning of § 1 of the Interstate Commerce Act. *Id.* at 477. The Supreme Court concluded that Alaska was indeed a territory because it was not merely a "description of a definite area of land or 'landed possession', but of a political unit, governing and being governed as such." *Id.* at 482. Under this analysis, the Outer Continental Shelf would not qualify as a territory since it lacks an "autonomous form of government."

83. *See supra* note 23.

84. *See supra* note 79.

85. 43 U.S.C. § 1334(f)(2) (Supp. III 1979). Gathering lines are defined as "any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed." *Id.*

86. Outer Continental Shelf Lands Act of 1953, Pub. L. No. 83-212, § 5, 67 Stat. 464, 43 U.S.C. § 1334 (1976).

tary issued regulations governing rights-of-way for "transportation lines"⁸⁷ and easements for "gathering lines".⁸⁸ Transportation lines were required to be operated "without discrimination" with respect to "oil or natural gas produced from . . . submerged lands in the vicinity of the pipeline."⁸⁹ The FPC was authorized to determine the proportionate access of leaseholders with respect to natural gas, and the ICC was charged with a similar duty with respect to oil.⁹⁰ Permits for rights-of-way for oil and gas transportation lines were issued by the Bureau of Land Management within the Department of Interior.⁹¹

On the other hand, gathering lines were not subject to the nondiscrimination provisions applicable to transportation lines. The purpose of gathering lines was to enable the leaseholder to move the product to a central point where it could be prepared by treating, storing, or measuring for the transfer of custody.⁹² It should be noted that the "central point" could be on or offshore and that, under a pooling provision, the leaseholder was permitted to commingle his production with the products of other leaseholders when it was transported through gathering lines.⁹³ Permits for easements for gathering lines were issued by the United States Geological Survey (USGS), also within the Department of the Interior.⁹⁴

According to a government report to the Chairman of FERC, Department of the Interior regulations obscured the distinction between gathering and transportation pipelines.⁹⁵ These regulations enlarged the definition of gathering lines by allowing producers to commingle their product in a pipeline that may be located off their leases in the Outer Continental Shelf. A pipeline could then transport the oil and gas to a central point that could be onshore or offshore. The report observed:

87. See 43 C.F.R. §§ 3340.1-.7 (1981). Section 3340.0-5 defines "right of way" as including: [T]he site on which the pipeline and associated structures are situated which shall not exceed 200 feet in width for pipelines . . . and shall be limited to the area reasonably necessary for pumping stations or other accessory structures. It does not include gathering lines and associated structures constructed for the purpose of conveying production for gathering, storage or treating of the production from a lease or leases.

88. See *id.* § 3340.0-2; see also 30 C.F.R. §§ 250.18, 250.68 (1980).

89. 43 U.S.C. § 1334(c) (1976).

90. *Id.*

91. 43 C.F.R. §§ 3340.0-1 to -.7 (1981).

92. 30 C.F.R. § 250.68 (1980).

93. *Id.*

94. *Id.* §§ 250.2(n), 250.18(a)(1).

95. Report to Charles B. Curtis, Chairman, Federal Energy Regulatory Commission from the United States General Accounting Office, Jan. 12, 1979 (copy on file in TULSA L.J. Office).

An oil company, when seeking approval to install a flow or gathering line across a section of the OCS (part of which is not under their lease) has the option to apply either to USGS for a right of use and easement or to the BLM for a right-of-way. The permits approved by BLM are usually to major pipeline transmission companies and a few oil and gas companies who are willing to subject themselves to the provisions . . . of the Act requiring the transportation of the products of others⁹⁶

Thus, the report concluded, Department of the Interior regulations allowed pipelines to circumvent FPC and ICC authority by making it possible for the USGS to grant gathering line permits for pipelines "whose essential function was transportation—i.e., carrying the production of several leaseholders to shore."⁹⁷ The OCSLAA remedied this problem by giving FERC the authority to exempt gathering lines from the open and nondiscriminatory access requirements.⁹⁸ Congress, however, stopped short of giving FERC authority to require the filing of tariffs for OCS oil pipelines.

V. CONCLUSION

*"A tale should be judicious, clear, succinct;
The language plain, and incidents well link'd;
Tell not as new what ev'ry body knows;
And new or old, still hasten to a close."*⁹⁹

The central question of whether FERC acquired the authority from the ICC to regulate interstate oil pipelines on the OCS must be answered in the negative. For several reasons, oil pipelines operating in the Outer Continental Shelf are not required to publish rates

96. *Id.* at 3 (quoting a joint memo from USGS offices in New Orleans and Metairie, La.).

97. *Id.* at 4.

98. Under the 1978 Amendments to the OCS Lands Act, section 5(e) preserves the Secretary of the Interior's authority to grant rights-of-way to oil and gas pipelines on the Outer Continental Shelf. 43 U.S.C. § 1334(e) (Supp. III 1979). In addition, section 5(f) appears to eliminate the distinction between gathering lines and transportation lines by providing that all rights-of-way on the OCS are conditioned upon the pipeline's providing "open and nondiscriminatory access to both owner and non-owner shippers." *Id.* § 1334(f)(1)(A). Section 5(f)(2) of the OCSLAA, however, permits FERC to exempt from the requirement "any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed." *Id.* § 1334(f)(2). Section 5(f)(2) thus maintains the distinction but requires a specific exemption by the FERC from the nondiscrimination requirement of section 5(e).

99. Order Ruling on Privileges Against Discovery, [Oct.-Dec. 1981 Transfer Binder] FED. ENERGY REG. COMM. (CCH) ¶ 63,048, at 65,243 n.2 (quoting a poem by William Cowper).

charged for carriage or to publish tariffs subject to the jurisdiction of FERC.

Although legally correct, this answer avoids consideration of the larger, policy question—should oil pipelines operating in the Outer Continental Shelf be subject to the full spectrum of public regulation, including the requirement to establish and publish tariffs? The answer to this question is one for Congress. It is argued here, however, that Congress should not change the law, and should allow these pipelines to continue to operate in a manner which is consistent with their non-public utility character.